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MAY - 6 1996

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

VIRGINIA OFFICE
1800 DIAGONAL ROAD, SUITE 300
ALEXANDRIA, VIRGINIA 22314

May 6, 1996

DELIVERED BY HAND

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20054

DOCKET FILE COPY ORIGINAL

**RE: CS Docket No. 96-83 - In the Matter of
Implementation of Section 207 of the
Telecommunications Act of 1996 - Notice of Proposed
Rulemaking - Restrictions on Over the Air Reception
Devices: Television Broadcast and Multichannel
Multipoint Distribution Service**

Dear Commissioners:

We are writing to express our concern about the potential adverse impact of the proposed rule preempting the enforcement of restrictive covenants or other non-governmental restrictions with respect to devices for over the air reception of television broadcast service (TVBS) or multichannel multipoint distribution services (MMDS).

Our firm represents over 150 condominiums, co-operative housing associations, and homeowner associations in the metropolitan Washington, D.C. area. These associations (collectively known as "community associations") are located in both urban and suburban areas. The community associations which we represent include high-rise buildings, garden-style mid-rise buildings, attached townhouse dwellings, and single family detached dwellings.

Although there are some differences in the legal organization and operation between condominiums, co-operatives and homeowner associations, the legal documents establishing virtually all community associations empower the governing Board of Directors to regulate the physical appearance of the community. Additionally, in most community associations, the owner of an individual dwelling or lot is prohibited by restrictive covenants recorded in

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the local land records from making any change to the exterior of the dwelling or erecting any new structure without the prior approval of the Board of Directors.

While few associations have covenants or rules which expressly prohibit television antennae, most associations have covenants which require prior association approval for any physical change to the exterior appearance of the dwelling or lot.

The validity and enforceability of such architectural control restrictive covenants has long been recognized by the courts as a means of preserving the architectural character of a community and maintaining property values of the restricted properties. In Maryland, for instance, architectural covenants have withstood judicial scrutiny for over 100 years! See *Peabody Heights Co. v. Willson*, 82 Md. 186, 32 A. 386 (Md. 1895).

Another typical characteristic of community associations is the existence of common areas owned by the Association or owned collectively by the individual homeowners.

With that background in mind, please consider the following:

1. The prohibition of the proposed regulation is broader than contemplated by Congress. Although the text of Section 207 of the Telecommunications Act of 1996 directs the FCC to promulgate regulations to prohibit restrictions that "impair" a viewer's ability to receive video programming services through devices designed for over the air reception of television broadcast signals or multichannel, multipoint distribution services, the House Committee Report states that this section of the statute is intended to preempt enforcement of restrictive covenants which "prevent" the use of antennae designed for receipt of TVBS and MMDS. In light of the ambiguity of the term "impair", the legislative history should be given considerable weight.

Although Congress apparently wanted to preempt covenants which prohibit entirely the ability to receive TVBS and MMDS, there is no indication in the legislative history that Congress intended to completely invalidate covenants or homeowner association rules which regulate the location or appearance of reception antennae but do not prohibit such devices. Therefore, we suggest that the rule be limited to preemption of covenants or rules which "prevent" the reception of video programming services through devices designed for over the air reception of TVBS or MMDS.

2. The proposed rule is vague as to when a covenant or rule "impairs a viewer's ability to receive video programming service." What regulation of antennae is permitted? If an association requires a homeowner to camouflage or screen an antennae, is the homeowner's ability to receive video programming "impaired" because the homeowner must incur an additional expense? Can an association require TVBS antennae to be placed in the attic or crawl space of a dwelling? Unless the rule is clarified as to what constitutes impairment of the ability to receive video programming, there will likely be protracted and

costly litigation between community associations and homeowners as to whether association regulation of these antennae is prohibited by the rule.

3. The burden of showing that a homeowner's ability to receive video programming is impaired by the restrictive covenant or rule should be on the homeowner. Contrary to the approach taken in the proposed rule, there should be a presumption that the association covenant or rule is enforceable. Only the homeowner will have information and evidence that the ability to receive video programming is impaired.

Except where there is a complete ban on extension antennae, there is no basis to presume that association regulation of the appearance or location of the antennae would impair the ability to receive video programming. Yet, it would be extremely difficult, if not impossible, for the association to demonstrate that video reception is not impaired.

4. With regard to state and local government regulation, the notice of proposed rulemaking states that Congress intended that the Commission "be cognizant of appropriate local concerns."

Yet, with regard to restrictive covenants and homeowner association rules, the rule makes no provision for accommodation of the "local concerns" of community associations. Just as health and safety considerations are central to the exercise of state local government land use powers, aesthetic considerations are central to the exercise of community association architectural covenant powers. At a minimum, community associations should retain the power to regulate the location and aesthetic appearance of antennae to the extent such regulation does not impair the ability of the homeowner to receive TVBS or MMDS.

5. With respect to the size of antennae, Section 207 does not mandate protection for any antennae or "mast" larger than necessary to permit reception of video programming services. Therefore, the rule should be modified to provide that association covenants are not preempted with respect to TVBS or MMDS antennae larger than the minimum size necessary to receive such video programming services.

6. With respect to the common areas of community associations, each individual owner typically has a non-exclusive right to use the common areas in a manner which does not interfere with the use rights of other owners. The association is responsible for control and maintenance of the common areas.


Therefore, we urge that the proposed rule be modified to make clear that no individual owner shall have an entitlement to locate any antennae on the common areas. Additionally, the rule should provide that any restrictive covenants with regard to the association's authority to control the use of the common areas remain fully enforceable.

Federal Communications Commission
May 6, 1996
Page 4

Thank you for the opportunity to comment on the proposed rule. Please include us on the mailing list in this proceeding.

Very cordially yours,

SILVERMAN & SCHILD, LLP

By: 
Thomas C. Schild

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